

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





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# 76-1083

To be argued by  
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES M. HENDRIX,

Defendant-Appellant.

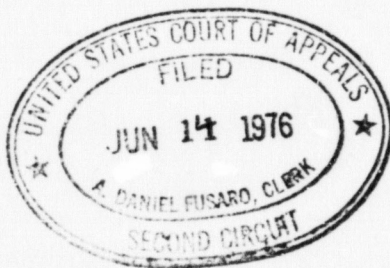
Docket No. 76-1083

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## BRIEF FOR APPELLANT

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether it was reversible error to instruct the jury to consider the "presumption of sanity" in deciding whether the Government had met its burden of proving that Hendrix was sane at the time of the crime.
2. Whether the refusal to grant the defense request to charge the jury on the lesser-included offense of involuntary manslaughter is error mandating reversal.
3. Whether the failure to exercise discretion in granting Hendrix' request for an instruction directing the jury that a verdict could be brought in finding Hendrix not guilty by reason of insanity was error mandating reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino) rendered February 20, 1976, after a jury trial, convicting appellant James Hendrix of second degree murder, in violation of 18 U.S.C. §1111. Hendrix was sentenced to a term of nine years in prison with a direction that he receive psychiatric care.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Introduction and Background

Late on the night of December 29, 1974, Robert Kiedinger was found dead in his cabin (193-194<sup>1</sup>) aboard the American ship,

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<sup>1</sup> Numerals in parentheses refer to pages of the transcript of appellant Hendrix' second trial, the first trial having resulted in a mistrial because of the jury's failure to reach a verdict. Since all motions made in the first trial, also before Judge Costantino, were specifically incorporated into the second trial (5, 544), references to those motions will be denoted by numerals referring to the transcript dated July 1-11, 1975.



S.S. Eagle Voyager,<sup>2</sup> which was then docked in the Russian port city of Odessa, on the Black Sea (169). The coroner's examination established that Kiedinger died as a result of asphyxiation by manual strangulation and that the body exhibited multiple abrasions, contusions, and lacerations (503). Appellant Hendrix was charged with murder in the second degree, in violation of 18 U.S.C. §1111.<sup>3</sup>

Hendrix and Kiedinger were both crewmen aboard the Eagle Voyager (165-168). The Government's theory of the case was that Hendrix, whose job it was to clean the officers' cabins, killed Kiedinger, his supervisor, as a result of friction arising from Kiedinger's evaluation of Hendrix' work. The defense to the charge was that Hendrix was insane when he assaulted Kiedinger and was therefore not legally responsible for the death.

To establish an animosity between Hendrix and Kiedinger, the Government relied on two incidents which occurred during the voyage from the United States to Russia. The first of these episodes occurred as the crew was returning from shore leave at Gibraltar. According to the testimony of the other crewmen present, Hendrix called Kiedinger either a "mother

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<sup>2</sup>The S.S. Eagle Voyager, owned by the Sea Transport Corporation, a Delaware corporation, had been chartered to transport wheat from the United States to the Soviet Union (160-163).

<sup>3</sup>The indictment is B to the separate appendix to appellant's brief.

fucking [or bald-headed] baby vaper"<sup>4</sup> (281, 585), or simply a "pervert" (453). Significantly, what this testimony also makes clear is that when Hendrix was chastised for the remark, he acknowledged that he was wrong (453) and apologized to Kiedinger<sup>5</sup> (286, 300, 362).

The second incident occurred after the ship docked at Odessa and Hendrix was "logged"<sup>6</sup> as a result of Kiedinger's report to the ship's master that Hendrix had gone ashore when he was supposed to be on (447, 521). Although Hendrix, according to this evidence, was concerned and upset about the logging, he was reassured by senior officers, as well as by his peers, that there was nothing to worry about since, in all probability, the logging would be lifted before the end of the voyage<sup>7</sup> (329-330, 449, 482-484).

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<sup>4</sup>Henry Manning, the third cook on the Eagle Voyager, testified that Hendrix, who was then 22 years old, had confided in him that Kiedinger, who was 50, had made sexual advances toward him (591).

<sup>5</sup>Raul Giron, a crew messman, who admitted disliking Hendrix (321-322), asserted that he heard Hendrix threaten to "get" Kiedinger (319). However, none of the other crewmen present heard such a threat (301, 362, 485).

<sup>6</sup>"Logging" is the entry of a negative report in the ship's log which can result, if the entry is not removed before the end of the voyage, in a \$50 fine (331, 447).

<sup>7</sup>Even if the entry was not removed, the loss to Hendrix was to be no more than \$50 of the more than \$1,000 he would be paid for the voyage (332).



B. Events of December 29, 1974

At approximately 10:00 a.m. on December 29, 1974, Hendrix asked Kiedinger when he met him in the mess hall if Kiedinger still had the gun he had purchased in Russia (172). Kiedinger responded that he had given it to the captain for safekeeping, and added that since he did not have any shells, Hendrix did not have to worry about Kiedinger's shooting him (173). According to General Hearne, Kiedinger had earlier been heard to say that the master had demanded the gun because he feared Kiedinger would use it on Hendrix<sup>8</sup> (372).

After spending a portion of the day<sup>9</sup> on leave, Hendrix returned to the ship at approximately 9:00 p.m., and announced to some members of the crew that he was "going to stop acting like a lamb and start acting like a lion" (271). According to these shipmates, Hendrix was then either "intoxicated" or "on his way to getting there" (271, 309, 346, 402).

Hendrix testified that during the course of that day he had consumed some champagne and Scotch and had smoked some

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<sup>8</sup> Although Hendrix had no memory of asking Kiedinger about the location of the gun, he did remember that some time earlier Kiedinger had threatened to shoot him (645).

<sup>9</sup> Hendrix testified that he spent his shore leave with his Russian "girl friend" and her family (

hashish<sup>10</sup> (638). He then decided to go to Kiedinger's cabin to re-establish their once good relationship (640). He knocked on the door and Kiedinger let him in (641). According to Hendrix, Kiedinger placed himself between Hendrix and the door, took Hendrix by the arm, "looked at my behind, and said he was going to fuck me" (642). In response, Hendrix knocked Kiedinger down and began kicking him (643). While Hendrix remembered that he turned his back to Kiedinger and that he kicked him with the heel of his boots, he could not remember what happened next. In fact, his memory of the period between the kicking and the time he was handcuffed and taken to the officers' lounge is non-existent (643-644).

That period and what followed immediately thereafter was testified to by several crew members. When Kiedinger's body was discovered, no weapons or dangerous instruments were found in the cabin (225), and the Government did not contend that any had been used to kill Kiedinger.

Gary Carter related how, about midnight, Hendrix pounded on the door of Carter's cabin, entered the room, pushed Carter's roommate aside, and began "hollering" and "mumbling" about having killed somebody (349-350). He also said that the steward

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<sup>10</sup>Hendrix remembered leaving his remaining supply of hashish on his bed( ). John Elklen, the chief engineer, who searched Hendrix' cabin, testified that hashish was found behind the light switch (428).



(Kiedinger) wouldn't mess with anybody any more. He asked Carter to help him hide his clothes. At, after taking off his pants, for no stated reason he put them back on again (351). According to Carter, everything Hendrix said was "mumblish" (352).

When Hendrix left Carter's cabin, he met Daniel Minnier whom he cautioned, despite the innocuousness of the encounter, "not to say a mother fucking word" (278). Minnier then watched Hendrix proceed to his own cabin<sup>11</sup> (290-292). Shortly thereafter Hendrix emerged wearing the same clothes and continued on to Henry Manning's cabin. Manning testified that Hendrix came into his room and announced that he had killed Kiedinger and thrown the body overboard<sup>12</sup> (590). He also told Manning that he knew what he had done and that it was wrong (597).

While he was in Manning's cabin Hendrix was taken into custody and handcuffed (457). At that time he was still wearing the jeans, bloodsoaked from his knees to his ankles, and bloodsoaked socks<sup>13</sup> (194, 278, 326, 350, 382, 458). Despite his incriminating attire, when confronted with the accusation

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<sup>11</sup>According to Minnier, the cabin was equipped with portholes which overlooked the water (291).

<sup>12</sup>This, of course, was untrue: Kiedinger's body was found in his own cabin (457).

<sup>13</sup>Hendrix' boots were found in plain view in a fire station recess located near his room (405).

that he had killed Kiedinger, Hendrix denied that he had anything to do with the killing (198, 327, 378, 405). According to Raul Giron, Hendrix was "crawling and screaming, saying he didn't kill nobody." He called his accusers "liars." He was "wild" (327, 343).

Dill Bellinger, the chief mate, who spent the next five hours with Hendrix in the officers' lounge, revealed that during that time Hendrix talked continuously. Again Hendrix denied killing Kiedinger, but this time offered to reveal who actually did do it (528). He also said, "The steward deserved to die" and "When you fight, you fight to kill." Then he worried about his new Russian girl friend, about ending up in Siberia, or being hanged (462). After awhile he decided he wanted to write a letter. He then spent considerable time fitfully starting, then crumbling up and discarding, one piece of stationery after another (463). At one time Hendrix asked Bellinger whether he thought he, Hendrix, was guilty (464). The next day Hendrix asked Arlen Jones where Kiedinger was and if he was alive (406).

In a report made immediately after the incident, General Hearnnes described Hendrix' conduct after the crime as follows:

... Changing from one mood to the other, such as confidence, fear, vindictiveness, helplessness, and the playing of at least one ethnic role, ... he lacked coordination, and his speech was slurred.

(399).

Other adjectives the crew attributed to Hendrix' conduct both



before and after the crime were "strange" (304), "crazy" (342), "agitated" (403), "mixed up" (407), "maniac" (493), and "irrational" (496).

C. Evidence Relating to Hendrix' Insanity  
at the Time of the Crime

Hendrix, who at the time of trial was 23 years old, testified as to his prior history. Both his mother, whom he had never seen, and his brother had been treated psychiatrically (604). As a seven year-old child, Hendrix had an emotional bed wetting problem for which he was punished by being made to wear a diaper and walk around the block (606). When his father punished him, he made him stand in the corner on his toes; then his father would strike him and call him a Nazi spy. At the age of nine or ten, Hendrix slit his wrists because he got a bad report card<sup>14</sup> (624).

Hendrix related how, in 1969, while incarcerated in a Houston, Texas, jail awaiting trial on a marijuana charge,<sup>15</sup> he was raped and sodomized (618) and stabbed with a sharpened spoon (619).

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<sup>14</sup>Since that time he had twice more -- on August 26 and September 6, 1975 -- tried to commit suicide by cutting his wrists (624).

<sup>15</sup>Hendrix was acquitted of these charges (617).

Two years later Hendrix was hospitalized for ten days for psychiatric treatment. This occurred at the Seventh Day Adventist Hospital in Karachi, West Pakistan, where Hendrix had sailed as a crewman on a ship known as the Jefferson Davis (608). At the time, Hendrix was delusional and hallucinating, and was diagnosed as psychotic and suffering from a paranoid reaction (727).<sup>16</sup>

The cause of this 1971 hospitalization was Hendrix' physical attack on a fellow crewman aboard the Jefferson Davis whom Hendrix believed was the devil.

Hendrix' behavior at that time and the incident aboard the Jefferson Davis were described by four other crewmen.<sup>17</sup> They said that prior to the attack Hendrix had expressed the belief that the devil was on the ship, in particular, lurking in the engine room (564, 566, 567). On one occasion Hendrix put black marks on a shipmate to encourage him to avoid the devil; on another occasion, in a state of "obvious agitation," Hendrix fled the engine room to escape the devil (564). When Hendrix launched

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<sup>16</sup> During his hospitalization, Hendrix had special duty nurses and was medicated with 600 milligrams of thorazine (723-730).

<sup>17</sup> This evidence appears in four 1971 letters which were introduced pursuant to a stipulation that if these witnesses were to testify they would assert the same facts set forth in the letters (561-567).



his unprovoked attack on Steve Malone, he kept calling Malone the devil (567).<sup>18</sup>

Prior to the fatal attack on Robert Kiedinger, Hendrix' behavior, as described by Henry Manning, was suspiciously bizarre. Manning recounted how he had observed Hendrix walking on deck late at night reciting or shouting insulting poems he had made up about people on the ship. When Manning later confronted Hendrix with this behavior, Hendrix denied having behaved in such a manner (579-583).

Dr. Augustus Kinzel, a psychiatrist and certified psychoanalyst with degrees from Yale, Pennsylvania, and Columbia Universities and training experience at Boston City Hospital and Columbia Presbyterian Hospital, where he was chief resident in psychiatry, testified for the defense. Prior to accepting his current position on the faculty of Physicians and Surgeons Medical School of Columbia University, Dr. Kinzel worked as a staff psychiatrist at the U.S. Medical Center for Federal Prisoners in Springfield, Missouri. He is a specialist in the causes of violent behavior (709-715).

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<sup>18</sup>Between this episode and the events on the Eagle Voyager, Hendrix was involved in at least two incidents -- one aboard the S.S. Arthur Middleton (653, 851), the other aboard the S.S. Trans Oregon (849).

While Dr. Kinzel did not examine Hendrix until August 1975 (792),<sup>19</sup> a report from the U.S. Medical Center at Springfield dated February 26, 1975 -- less than two months after the crime -- diagnosed Hendrix as suffering from "chronic undifferentiated schizophrenia" (756).<sup>20</sup> Similarly, on April 7, 1975, notation on the medical records of the Metropolitan Correctional Center in New York City explains that Hendrix' "persistent auditory hallucinations" -- according to Dr. Kinzel, a typical sign of schizophrenia (751) -- required that he be medicated with a daily dosage of 600 milligrams of thorazine (750-751).

Dr. Kinzel testified that when Hendrix attacked Kiedinger he was

... so mentally ill that he was able to lack substantial capacity to know the wrongfulness to know what he was doing and to conform his conduct to the requirements of the law.

... [H]e was undergoing a mental breakdown before the time of this occurrence and when this occurred he acted according to delusions rather than according to any rational

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<sup>19</sup> In the interim between Hendrix' arrival from Russia and the examination, there had been the first trial, at which another psychiatrist, Dr. Irwin Perr, who examined Hendrix on April 1, 1975, had testified that Hendrix was legally insane at the time of the assault on Kiedinger (Transcript of July 5, 1975, at 659, 674-698).

<sup>20</sup> While the purpose of the Springfield examination was to determine Hendrix' competence to stand trial, Dr. Kinzel explained that from his experience at Springfield he knew that the examination was complete and would encompass the patient's past history (755).



reasons for wanting to harm someone. The basic delusion that he was acting under was that there was an evil, some kind of evil bizarre force that he felt was in others not simply the victim; then at the time of the offense he had the distinct feeling this evil force was in the victim; that his behavior from that point on was that he felt he was doing right by stomping out this evil force. This gave me the impression that he was acting psychotically; that is, acting according to a very odd belief that was a product of his mental illness.

(756-757).

On distinguishing between a "personality disorder" and a "mental disease," and explaining how he concluded that Hendrix was suffering from the latter, Dr. Kinzel testified:

A personality disorder is quite different from a mental illness where someone has a mental breakdown. A personality disorder [is a] trait in one's personality that brings him into a lot of difficulty with other people that creates a lot of friction that creates a lot of -- very often -- trouble with authority, that kind of thing; chronic traits don't involve a breakdown of the personality. They are just there and usually are there since childhood. It's quite different from a mental breakdown.

\* \* \*

... I think there are some features that [Hendrix] shows in his behavior of the personality disorder, but there were so many psychotic symptoms that he's had that it would make one feel that -- feel at least he had an underlying mental disorder, mental illness. Again, the psychotic symptoms, the hallucinations, the agitated move, the emotions, ranging all the way from laughing at inappropriate times to outbursts of rage, sullen or no emotional states, the thoughts that skip one from the other so there is no logical connection between them; behavior which is consistently inconsistent; that

the individual starts to do A, stops, starts to do B and stops, and goes back and does A again, can't do anything consistently, these are all signs of a psychotic mental illness, not signs of personality disorder.

(763-764).

As to the descriptions of Hendrix' conduct at the time of the crime, Dr. Kinzel found significantly probative of a mental breakdown Hendrix' utter inability to change and hide his incriminating clothing, to recount a consistent story -- first admitting and then denying the killing (772, 774), his generally "agitated" condition (765-767). Also probative of this mental breakdown were Hendrix' delusional belief that he had thrown Kiedinger's body overboard (775), his confusion the day after the crime when he asked if Kiedinger was alive (769), and his earlier hostile poetry (770-771). Of particular significance, according to Dr. Kinzel, was the inconsistent emotional state described by General Hearn. Of this behavior, Dr. Kinzel testified:

There is no consistent emotional state in a person. Most of us walk around with a reasonably positive consistent mood. Someone who is having a mental breakdown will go from a high to a low, to an angry feeling, or sad feeling, and they go very quickly without anything in reality prompting them, that is their contact with reality when this is happening.

(772).

Of Hendrix' comment to Bellinger that "Kiedinger deserved to die," Dr. Kinzel explained:



... I would think that at this point he would be trying to make sense out of what he did. And my impression would be, as it was when I was interviewing him, that he was trying to make it seem as if it was a rational act, that the steward deserved to die and when you are fighting you should kill, in other words, you should be tough. A reasonable thing rather than an irrational act.

(773-774).<sup>21</sup>

As to Hendrix' alleged inquiry of Kiedinger if the latter still had his gun, Dr. Kinzel candidly testified:

... I would have to know what frame of mind he was in, whether he was asked did he still have a gun that he might kill with, or did he still have a gun as a matter of interest, or did he still have a gun and he says I want to kill him. There would be no way to evaluate that unless I know what was going on in his mind, unless I know what prompted him to ask the question.

(785).

In contrast, the Government's psychiatrist, Dr. David Abrahamsen,<sup>22</sup> who testified to Hendrix' competence at the time of the crime (873), speculatively analyzed this same fact as follows:

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<sup>21</sup>This attempt at rationalization, Dr. Kinzel found, was similar to Hendrix' attempt during the psychiatric examination to present his conduct as rational behavior, and was a factor in the doctor's conclusion that Hendrix was not malingering (760).

<sup>22</sup>Dr. Abrahamsen attended the medical school of Oslo University and took courses in psychiatry at St. Elizabeth's Hospital, at Diagnostic Depot, at Illinois Penitentiary, Bellevue Hospital, and the Meninger Clinic (864).

It might very well mean that the defendant wanted to be sure that the deceased didn't have a gun in case the defendant was going to do something to him, and possibly might be hurt himself if he did something to the deceased. This is the only explanation I can find.

(877).<sup>23</sup>

Inferences patently outside the scope of psychiatric expertise characterized much of Dr. Abrahamsen's testimony. For example, of Hendrix' fleeting attempt to change his clothes, Abrahamsen definitively asserted:

When a man says that he would like to get rid of his boots and pants, it really means that he would like to hide the alleged crime which may have been committed. He is very much aware of the situation that he has done something wrong and is trying to get away from it.

(874-875).

Similarly, of Hendrix' inconsistent denials of guilt to certain members of the Eagle Voyager crew, Abrahamsen contended, without support in the record:

It might very well be that he possibly was afraid of authority, you see, which these officers represented and possibly also was afraid of any punishment he might get.

(876; see also 877-875).

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<sup>23</sup> Abrahamsen did not examine appellant until May 29, 1975.



In his charge to the jurors,<sup>24</sup> Judge Costantino, over defense objection, refused to instruct on the lesser-included offenses of both voluntary and involuntary manslaughter (Transcript of July , 1975, at 756, 873-875). On the issue of Hendrix' insanity at the time of the crime, the District Judge instructed the jurors to consider the presumption of sanity in determining whether Hendrix was sane:

You are not bound by the opinions of either expert or lay witnesses. You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case, and give it such weight as you believe it is fairly entitled to receive.

You may also consider that every man is presumed to be sane, that is, to be without mental disease, and to be responsible for his acts. A presumption may, however, be overcome by evidence. You should consider these principles in the light of all the evidence in the case, and give them such weight as you believe they are fairly entitled to receive.

(1014-1015).

Over strenuous defense objection, and contrary to the ruling made in the first trial, Judge Costantino refused to present the jury with the alternative of a trifurcated verdict of (1) guilty, (2) not guilty, or (3) not guilty by reason of insanity.

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<sup>24</sup>The complete charge is C to the separate appendix to appellant's brief.

The Judge declined so to charge, as requested, despite his inclination to do so, because he mistakenly believed that this Court had precluded the trifurcated charge (944-945).

After deliberations, the jury returned a verdict of guilty. Hendrix was sentenced<sup>24</sup> to a period of nine years in prison with a specific direction that he receive psychiatric treatment.

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<sup>24</sup>Hendrix' "statement" to the court prior to the imposition of sentence is D to the separate appendix to appellant's brief.



## ARGUMENT

### Point I

IT WAS REVERSIBLE ERROR TO INSTRUCT THE JURY TO CONSIDER THE "PRESUMPTION OF SANITY" IN DECIDING WHETHER THE GOVERNMENT HAD MET ITS BURDEN OF PROVING THAT HENDRIX WAS SANE AT THE TIME OF THE CRIME.

The defense to the murder charge was that Hendrix was insane at the time of the crime. The substantial evidence as to Hendrix' mental illness and his lack of responsibility for the crime squarely placed his sanity in issue and required, as Judge Costantino indeed found, that the Government had to establish Hendrix' sanity beyond a reasonable doubt.

Despite this posture of the case, and in direct contradiction to his own finding that sanity was at issue, Judge Costantino, in his charge, improperly (1) informed the jurors of the existence of the presumption of sanity, (2) allowed them to redetermine whether the presumption had been overcome, and (3) directed the jurors that the presumption nonetheless remained evidence which eased the Government's burden of proof. Specifically, he instructed:

You may also consider that every man is presumed to be sane, that is, to be without mental disease, and to be responsible for his acts. A presumption may, however, be overcome by evidence. You should consider these principles in light

of all the evidence in the case, and give them such weight as you believe they are fairly entitled to receive.

(1015). Emphasis added.

This instruction reveals a fundamental misapprehension of the law<sup>25</sup> which, in the context of this case, made impossible a proper evaluation by the jury of the insanity defense. At the time the case was submitted to the jury there was no conceivable or justifiable reason for telling the jury about the presumption, for the presumption was no longer in the case.

The presumption of sanity is a "legal" presumption. United States v. Lawrence, 480 F.2d 688, 692 (5th Cir. 1973); Wigmore, ON EVIDENCE, §52490, 2491 (3d ed. 1940). It functions only as the mechanism by which to impose upon a defendant the initial burden of coming forward with some evidence of insanity. United States v. Lawrence, supra; Wigmore, ON EVIDENCE, supra. Once sufficient evidence has been presented, the presumption of sanity simply disappears from the case. United States v. Bohle, 445 F.2d 54, 70 (7th Cir. 1971); United States v. Skinner, 437 F.2d 164, 166 (5th Cir. 1971); United States v. Ingman, 426 F.2d 973, 976 (9th Cir. 1970); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); Brook

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<sup>25</sup> While counsel did not object to the charge as given by the the Court, the error was so substantial as to deprive Hendrix of a fair trial. United States v. Skinner, 437 F.2d 164, 166-167 (5th Cir. 1971).



v. United States, 387 F.2d 254, 257 (5th Cir. 1967); Davis v. United States, 364 F.2d 572, 574 (10th Cir. 1966).

In this case, where there is no dispute that substantial evidence of insanity put sanity in issue, Judge Costantino erred in the first instance by telling the jurors about the presumption, and then compounded the error by the instruction that the presumption remained a viable piece of evidence to be considered in the determination of sanity. This direction was wrong because the presumption contains no probative force, and therefore cannot add any weight to the facts upon which the prosecution may rely. Wigmore, ON EVIDENCE, supra, §2491(3).

In United States v. Lawrence, supra, 480 F.2d at 692, the Court of Appeals for the Fifth Circuit cogently explained the proper operation of the presumption as follows:

The presumption of sanity has been described as "a rule stating that the defendant has the burden of producing evidence of his insanity at the time of the offense." C. McCormack, EVIDENCE (2d ed.) §346 (1972). The presumption of sanity is not an intangible bit of substantive evidence inuring to the prosecution's benefit but is "simply a convenient aid to rational determination ... based on the common experience of mankind that the overwhelming majority of us, regardless of our differences, quirks and peculiarities, are of sufficient mental responsibility that we meet the test of criminal responsibility ... [and] not to be deified into something else by formalistic application to a situation totally foreign to its purpose." Hackworth v. United States, 380 F.2d 19, 21 (5th Cir. 1967).

The plain meaning of the words "presumption of sanity" necessarily conveyed to the jurors the erroneous belief that the starting point of their analysis was the assumption that Hendrix was sane. From there, it was only logical that the jurors would understand that they had to find he was sane unless the evidence of insanity overcame the force of the presumption. Therefore, it is clear that, despite the correct instruction on the Government's burden of proof, this challenged portion of the charge had the effect of placing the burden of proof on Hendrix. Also, of necessity, it inspired an inappropriate skepticism of the validity of the psychiatric evidence of insanity, which now unfairly had to be weighed against the presumption that all people are sane.



The impact of this charge on the jury must have been great, for a conviction resulted notwithstanding the extraordinarily strong evidence of insanity and the inappropriate nature of the Government's evidence in response.

As a preliminary matter, even the Government's theory of the background and motivation for the crime indicate that Hendrix was mentally ill. The animosity between him and Kiedinger over the criticism of Hendrix' work was hardly rational justification for such a violent reaction. This is particularly true in light of the fact that the "logging" which supposedly triggered the fatal confrontation, was known to Hendrix to be little more than a formality.

The facts of the crime and Hendrix' behavior immediately thereafter are further evidence of his mental instability. His behavior was completely erratic,

... [c]hanging from one mood to the other, such as confidence, fear, vindictiveness, helplessness, and the playing of at least one ethnic role, ... he lacked coordination and his speech was slurred.

(399).

He was unable, despite his stated intention and ample opportunity, to change and hide his incriminating clothing. At first he acknowledged what he had done, but when confronted with the deed and his bloodstained clothing, denied having anything to do with the killing.

The crewmen on board the ship described Hendrix' behavior as "strange," "crazy," "agitated," "mixed up," "manic," and

"irrational."

These characterizations are not surprising since Hendrix had a history of serious mental illness. A violent episode aboard the S.S. Jefferson Davis in 1971 produced a period of hospitalization when he was diagnosed as psychotic and suffering from paranoid reaction.

Upon his return from the Soviet Union, Hendrix was sent to the U.S. Medical Center in Springfield, Missouri, where his condition was diagnosed as "chronic undifferentiated schizophrenia." Records of the Metropolitan Correctional Center, where Hendrix was incarcerated pending trial, reveal that he suffered from persistent auditory hallucinations -- a typical sign of schizophrenia. At trial, Dr. Kinzel, the psychiatrist who testified for the defense, asserted that when Hendrix attacked Kiedinger he was undergoing a major mental breakdown and was acting

... according to delusions rather than according to any rational reasons for wanting to harm someone. The basic delusion that he was acting under was that there was an evil, some kind of evil bizarre force that he felt was in others not simply the victim; then at the time of the offense he had the distinct feeling this evil force was in the victim; that his behavior from that point on was that he felt he was doing right by stomping out this evil force. This gave me the impression that he was acting psychotically; that is, acting according to a very odd belief that was a product of his mental illness.

(756-757).



See also appellant's statement at the time of sentence, D to the separate appendix to appellant's brief.

To counter this mass of evidence of insanity, the Government offered the testimony of Dr. Abrahamsen, who testified assuming that Hendrix was sane and interpreting Hendrix' actions in light of normal behavior patterns. Further, Abrahamsen's testimony was given as fact rather than as opinion. His testimony was totally inappropriate because it stated as factual conclusion what the jury was supposed to determine. Any questions the jury may have held as to the psychiatric validity of Dr. Abrahamsen's testimony were likely laid to rest by the District Court's charge on the presumption of sanity which advised the jurors that Hendrix was indeed to be considered sane and his conduct viewed as the behavior of a normal person.

Because the charge on the presumption of sanity improperly weighted the evidence in the Government's favor, and therefore eased the Government's burden of proof on this issue, the conviction must be reversed.

Point II

THE REFUSAL TO GRANT THE DEFENSE  
REQUEST TO CHARGE THE JURY ON THE  
LESSER-INCLUDED OFFENSE OF INVOLUN-  
TARY MANSLAUGHTER IS ERROR MANDATING  
REVERSAL.

Defense counsel requested that the jury be charged on the lesser-included offenses of voluntary and involuntary manslaughter.<sup>26</sup> The Federal statute governing both these lesser crimes provides:

§1112. Manslaughter

(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary -- Upon a sudden quarrel or heat of passion.

Involuntary -- In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of voluntary manslaughter, shall be imprisoned not more than ten years;

Whoever is guilty of involuntary manslaughter, shall be fined not more than \$1,000 or imprisoned not more than three years, or both.

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<sup>26</sup>Defense counsel's request made during the first trial was incorporated by reference as his request for the charge in the second trial.



Counsel argued that the involuntary manslaughter charge was appropriate<sup>27</sup> because one view of the evidence supported a finding that Kiedinger died during an assault by "striking, beating, or wounding," a misdemeanor offense under 18 U.S.C. §113(d).<sup>28</sup> That statute provides:

§113. Assaults within maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

...

(d) Assault by striking, beating, or wounding, by fine of not more than \$500 or imprisonment for not more than six months, or both.

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<sup>27</sup>The prosecutor agreed that Hendrix was entitled to a charge on voluntary manslaughter (Transcript dated July 9, 1975, at 874).

<sup>28</sup>Title 18 U.S.C. §1 provides:

§1. Offenses classified

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both, is a petty offense.

Thus, if a simple assault produced a death, the highest degree of crime would be involuntary manslaughter.

Judge Costantino rejected this argument and refused to give the involuntary manslaughter instruction.<sup>29</sup> He held that Hendrix' assault on Kiedinger was not a simple assault because the boots involved were a "dangerous weapon" which, under §113(c),<sup>30</sup> made the assault a felony.

Alternatively, he held that the fact of the strangling somehow precluded a finding of involuntary manslaughter (Transcript of July 9, 1975, at 874-875). This ruling was error mandating reversal.

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<sup>29</sup>The District Judge's having denied the instruction on involuntary manslaughter, counsel declined to accept a lesser-included charge on voluntary manslaughter on the theory that to do so would encourage the jury to compromise (Transcript of July 9, 1975, at 874, 875).

<sup>30</sup>Title 18 U.S.C. §113(c) provides:

Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

...

(c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than \$1,000 or imprisonment for not more than five years, or both.



There can be no dispute that, as a legal matter, manslaughter, both voluntary and involuntary, is a crime included within the charge of murder. Sansone v. United States, 380 U.S. 343, 359-350 (1965); Berra v. United States, 351 U.S. 131, 134 (1956); Stevenson v. United States, 162 U.S. 313 (1896); Wright, FEDERAL PRACTICE & PROCEDURES, §515 at 372 (4th ed. 1969).

Further, as a matter of right, a defendant is entitled to an instruction on this lesser charge if the evidence would permit the jury to find him guilty of that offense. Sansone v. United States, *supra*; Berra v. United States, *supra*; see also Sims v. United States, 405 F.2d 1381, 1384 n.5 (D.C. Cir. 1968); Belton v. United States, 382 F.2d 150, 155 (D.C. Cir. 1967); Broughman v. United States, 361 F.2d 71, 72 (D.C. Cir. 1966); Greenfield v. United States, 341 F.2d 411, 412-413 (D.C. Cir. 1964). Thus, the only question is whether any version of the facts presented below would support a jury verdict of involuntary manslaughter.

The standard for the quantum and quality of evidence necessary to mandate the instruction is very low: the charge must be given if

... there is any evidence, however weak, tending to show manslaughter.

Sims v. United States, *supra*,  
405 F.2d 25 1384, n.5.  
Emphasis added.

The rationale for the rule is obvious. Findings of fact,

which require assessment of witness credibility, are solely within the province of the jury. The jury may give credence to testimony which to the judge might appear incredible because of the strength of the Government's case. Stevenson v. United States, supra, 162 U.S. at 315; Belton v. United States, supra, 382 F.2d at 155.

Moreover, since the jury is empowered to accept any portion of a witness' testimony while rejecting the balance, the charge on a lesser offense must be given even if such a finding would require rejection of a substantial portion of the defense case. Belton v. United States, supra, 382 F.2d at 155-157; Broughman v. United States, supra, 361 F.2d at 72; Womack v. United States, 336 F.2d 959 (D.C. Cir. 1964).

With this as a background, it is clear that Judge Costantino was in error when he refused to charge the jury on involuntary manslaughter. The fact that Hendrix used his boots to kick Kiedinger does not automatically mean that Hendrix committed a felony rather than a misdemeanor assault. Judge Costantino's "finding" that the boots, as used, were a "dangerous weapon" was simply not within his province to determine. Greenfield v. United States, supra, 341 F.2d at 412.

In Greenfield, reversible error was found because the trial judge decided that a glass soda bottle (an instrument with the potential properties of a knife) was a "dangerous weapon" which precluded a misdemeanor assault charge. The



Court of Appeals there held that whether the bottle, in the circumstances in which it was used, was a dangerous weapon was a question of fact for the jury to determine, and the refusal so to charge required reversal.

So, too, in this case. The issue of whether the boots constituted a "dangerous weapon" was solely within the province of the jury to decide. Judge Costantino's refusal to permit a jury determination on that issue requires reversal of the judgment.

The same rationale applies to the issue of whether Hendrix intended to kill Kiedinger. Whether Hendrix went to Kiedinger's cabin to reestablish their friendship or to "act like a lion instead of a lamb" is irrelevant. In either case, Hendrix' reason for going to the cabin does not preclude a finding that he did not intend to kill and that his acts constituted only a simple assault which accidentally produced death. Important to a showing that there was no intent to kill is the uncontradicted evidence that, despite the accessibility of weapons -- axes were located at every fire station on the ship -- Hendrix was unarmed when he arrived at Kiedinger's quarters.

No evidence was presented as to the specific facts of the fight. Hendrix had no memory beyond the point at which he began to kick Kiedinger. The coroner testified that the cause of death was asphyxiation by strangulation, and that does not establish intent to kill as a matter of law. Not

only was the jury free to reject the coroner's testimony, even accepting it does not preclude a finding that Hendrix did not intend to kill Kiedinger. Dr. Kinzel testified that Hendrix' behavior may be explained in terms of his belief that an evil force existed in Kiedinger. Appellant's actions, thus, may have been his own bizarre attempt to exorcise this "evil." Surely it is possible that Hendrix did not appreciate the force of his hands, and in that context he was entitled to have the jury determine whether he intended to cause death.

The District Court's refusal to charge on the lesser-included offenses of voluntary and involuntary manslaughter requires that the conviction for murder be reversed.



Point III

THE FAILURE TO EXERCISE DISCRETION  
IN GRANTING HENDRIX' REQUEST FOR AN  
INSTRUCTION DIRECTING THE JURY THAT  
A VERDICT COULD BE BROUGHT IN FIND-  
ING HENDRIX NOT GUILTY BY REASON OF  
INSANITY WAS ERROR MANDATING REVER-  
SAL.

Defense counsel requested that the jurors be instructed that they had the option of finding Hendrix not guilty by reason of insanity. Counsel reasoned that this option would compensate for the jurors' understandable reluctance to acquit Hendrix in these circumstances. This charge had been given in the first trial.

Moreover, it is a charge which has been given and has survived challenge in other circuits. United States v. McCracken, 488 F.2d 406, 415-421 (5th Cir. 1974); United States v. Skinner, *supra*; United States v. Harper, 460 F.2d 705 (5th Cir. 1972). In fact, in Harper, the only verdict alternatives given were "guilty" or "not guilty by reason of insanity."

Despite this history, Judge Costantino, based on his misreading of United States v. Barrera, 486 F.2d 333, 339 (2d Cir. 1973), believed that he did not have the power to grant counsel's request. All the Barrera Court said on this issue was:

This Circuit does not provide for a verdict of "not guilty by reason of insanity" as requested by appellant.

An analysis of Barrera, which is based on United States v. Freeman, 357 F.2d 606, 626 (2d Cir. 1973), reveals that it does not preclude giving the requested verdict alternative. To the contrary, Freeman suggests that this verdict alternative is particularly appropriate.

What Judge Kaufman's opinion in Freeman, 357 F.2d at 625-626, made clear was that the new standards there enunciated for adjudging insanity mandate that there be Federal legislation to deal with persons found not guilty by reason of insanity and that until that time those persons must be turned over to State officials for commitment pursuant to State procedures. Obviously, toward that end, a verdict alternative of "not guilty by reason of insanity" is essential. Without that alternative, the only course open to a jury which finds the defendant to be insane is to return a "not guilty" verdict. On its face that verdict means that the prosecution had failed to establish any elements of the crime. Absent the verdict requested, the jury's real reasons for acquittal will be nowhere articulated, and the defendant is thereby insulated, certainly without further extensive procedures, from commitment by State authorities.

Hendrix was entitled to have the judge exercise his discretion in this matter, and Judge Costantino's failure to do so is reversible error. United States v. Brown, 470 F.2d 285 (2d Cir. 1972).



CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and a new trial ordered.

Respectfully submitted,

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